

# Journal of Contemporary Health Law & Policy (1985-2015)

---

Volume 19 | Issue 1

Article 9

---

2002

## An Argument for Considering Parental Smoking in Child Abuse and Neglect Proceedings

Carlos Clark

Follow this and additional works at: <https://scholarship.law.edu/jchlp>

---

### Recommended Citation

Carlos Clark, *An Argument for Considering Parental Smoking in Child Abuse and Neglect Proceedings*, 19 J. Contemp. Health L. & Pol'y 225 (2003).

Available at: <https://scholarship.law.edu/jchlp/vol19/iss1/9>

This Comment is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Journal of Contemporary Health Law & Policy (1985-2015) by an authorized editor of CUA Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

# AN ARGUMENT FOR CONSIDERING PARENTAL SMOKING IN CHILD ABUSE AND NEGLECT PROCEEDINGS

Carlos Clark

## INTRODUCTION

It is a Saturday afternoon, and a pregnant mother is strolling through the local shopping mall. During the entire afternoon, she puffs on a cigarette. Many people in our society would be outraged at this sight because the mother should know better.<sup>1</sup> After all, federal law requires tobacco companies to place a label on cigarette packages with warnings about the dangers of smoking while pregnant.<sup>2</sup> In contrast, picture a mother not pregnant, walking through the shopping mall smoking a cigarette and holding her five year-old daughter's hand. Unfortunately, this latter scenario does not upset our society as much as the former.<sup>3</sup> Thus, children of parents who smoke are left unprotected from the harmful effects of second-hand smoke.<sup>4</sup>

The World Health Organization (WHO),<sup>5</sup> the United Nations' specialized agency for health, recently released a report entitled *Tobacco*

---

1. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, WOMEN AND SMOKING: A REPORT OF THE SURGEON GENERAL (2001) (concluding that "smoking during pregnancy remains a major public health problem despite increased knowledge of the adverse health effects of smoking during pregnancy."). See also Jennifer M. Cohn, *Substance Abuse in Pregnancy: Where Does the Blame Lie?*, *The American Journal of Bioethics* (Nov. 4, 1999), available at [http://ajobonline.com/er\\_bioethics.php?task=view&articleID=419](http://ajobonline.com/er_bioethics.php?task=view&articleID=419).

2. Comprehensive Smoking Education Act of 1984, 15 U.S.C. §§ 1331-1340 (1984) (requiring that one of four specific health warnings appear on all cigarette packages and advertisements, one of which reads: "SURGEON GENERAL'S WARNING: Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.").

3. But cf. Darren K. Carlson, *Half of Americans Say Second-Hand Smoke Is "Very Harmful": Public Favors Setting Aside Areas for Smoking in Public Places, Rather Than a Total Ban*, GALLUP NEWS SERVICE, July 25, 2001 (stating a new Gallup poll on this topic shows that roughly half of the American public (fifty-two percent) believe second-hand cigarette smoke is "very harmful").

4. See ROY J. SHEPARD, *THE RISKS OF PASSIVE SMOKING* 99-102 (1982).

5. The World Health Organization (WHO), the United Nations' specialized agency for health, was established on Apr. 7, 1948. The WHO's objective, as set out in its Constitution, is the attainment by all people of the highest possible level

and the Rights of the Child,<sup>6</sup> stating that tobacco greatly endangers the basic health and welfare of children.<sup>7</sup> In this report, the WHO states that exposure to tobacco smoke significantly damages the health of children, increasing the likelihood that they will contract respiratory ailments such as bronchitis, pneumonia and asthma.<sup>8</sup> Furthermore, the WHO encourages countries to take all necessary legislative and regulatory measures to protect children from tobacco and ensure that the interests of children take precedence over those of the tobacco industry.<sup>9</sup>

The harmful effect of cigarette smoke has been a major issue in America for a considerable period of time.<sup>10</sup> In 1964, Luther L. Terry, M.D., Surgeon General of the United States Public Health Service (PHS) released the report of the Surgeon General's Advisory Committee on Smoking and Health.<sup>11</sup> "That landmark document . . . was America's first widely publicized official recognition that cigarette smoking is a cause of cancer and other serious diseases."<sup>12</sup> The PHS concluded that smoking tobacco is a leading cause of lung cancer, heart disorders, bronchitis, emphysema and other disorders in persons who smoke.<sup>13</sup> In 1986, the Surgeon General devoted an entire report to the topic of involuntary smoking, known commonly as second-hand smoke.<sup>14</sup> This report concluded that "involuntary smoking [second-hand smoke] is a cause of

---

of health. Health is defined in the WHO's Constitution as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. WHO CONSTITUTION, pmbl., available at [policy.who.int/cgi-bin/im\\_isapi.dll?hitsperheading=on&infobase=basicdoc&record={9D5}software=Document42](http://policy.who.int/cgi-bin/im_isapi.dll?hitsperheading=on&infobase=basicdoc&record={9D5}software=Document42) (last visited Jan. 29, 2003).

6. WORLD HEALTH ORGANIZATION, TOBACCO AND THE RIGHTS OF THE CHILD, (2001), at <http://www5.who.int/tobacco/repository/stp53/CRCreport.pdf>.

7. *Id.*

8. *Id.*

9. See also SHEPHARD, *supra* note 4.

10. See ELIZABETH M. WHELAN, *Foreword* to AM. COUNCIL ON SCI. AND HEALTH, CIGARETTES: WHAT THE WARNING LABEL DOESN'T TELL YOU, vii (1997) [hereinafter CIGARETTES].

11. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SMOKING AND HEALTH, A REPORT OF THE SURGEON GENERAL (1964) [hereinafter 1964 SURGEON GENERAL'S REPORT].

12. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS, at iii (1989) [hereinafter 1989 SURGEON GENERAL'S REPORT].

13. 1964 SURGEON GENERAL'S REPORT, *supra* note 11, at 33-40.

14. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL (1986) [hereinafter 1986 SURGEON GENERAL'S REPORT].

disease, including lung cancer, in healthy nonsmokers.”<sup>15</sup> In addition, the report revealed that “the children of parents who smoke, compared with the children of nonsmoking parents, have an increased frequency of respiratory infections, increased respiratory symptoms and slightly smaller rates of increase in lung function as the lung matures.”<sup>16</sup> C. Everett Koop, M.D., the Surgeon General in 1986, “strongly urge[d] parents to refrain from smoking in the presence of children as a means of protecting . . . their children’s current health status.”<sup>17</sup> Nevertheless, many smokers ignore this warning and continue to smoke in the presence of their children.

Since the Surgeon General’s report in 1986, medical and scientific studies have continued to educate the public about the harmful effects of second-hand smoke (often called environmental tobacco smoke, hereinafter “ETS”) on nonsmokers.<sup>18</sup> The studies present strong evidence that tobacco smoke is most harmful to individuals who inhale it in enclosed spaces over prolonged periods of their lives.<sup>19</sup> Additionally, children raised in homes with smokers have been shown to be particularly vulnerable.<sup>20</sup> Medical research has established a nexus between the inhalation of tobacco smoke during infancy and a wide range of health problems, most notably respiratory problems.<sup>21</sup> Further research has demonstrated that these health problems extend far beyond infancy and increase the risk of developing lung cancer later in life.<sup>22</sup>

Only recently has our society begun to grasp the reality that the harms of smoking extend beyond smokers to all nonsmokers who inhale cigarette smoke. Unfortunately, the tobacco industry strategically creates doubt and controversy about scientific findings to counter all media coverage stating that ETS is harmful.<sup>23</sup> Consequently, parents who smoke are

---

15. *Id.* at vii.

16. *Id.*

17. *Id.* at xi.

18. See CIGARETTES, *supra* note 10, at 70-9.

19. *Id.*

20. 1986 SURGEON GENERAL’S REPORT, *supra* note 14, at 7. See also U.S. ENVIRONMENTAL PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1992) [hereinafter RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING].

21. 1986 SURGEON GENERAL’S REPORT, *supra* note 14, at 10 (stating there is a link between acute and chronic respiratory disease and involuntary exposure to tobacco smoke).

22. See CIGARETTES, *supra* note 10, at 70-79.

23. For example, the website of P.J. Carroll & Company Limited, a manufacturer of tobacco products, states:

unlikely to accept the truth that their cigarette smoke harms their children.<sup>24</sup> However, if one accepts this scientific conclusion, the question remains: What legislative and regulatory measures are needed to protect children from cigarette smoke and ensure that the interests of children take precedence over those of the tobacco industry?

This Comment examines ETS' effect on children's health and asks whether evidence of parental smoking should be considered as a factor in child abuse and neglect proceedings. Section I examines our society and the judicial system's changing views on tobacco smoking and parental rights. Section II critiques the analysis involved in judicial determinations of child abuse and neglect proceedings. Section III looks at the harmful effects of ETS on children and examines the innovative reasoning of several state courts which have held that subjecting children to second-hand smoke can, and should, be a factor in deciding custody.<sup>25</sup> Finally, this Comment concludes with a determination that in order to protect the interests of the child, our legislature and judiciary must consider evidence of parental smoking in child abuse and neglect proceedings.

## I. SOCIETY'S CHANGING VIEWS ABOUT SMOKING AND PARENTAL RIGHTS

### *A. Cigarettes in American Society: A Brief History*

Public opinion regarding cigarette smoking has changed significantly over the last century.<sup>26</sup> This change is the motivating force behind the transformation and expansion of existing laws. Cigarette smoking was not always as socially acceptable in American culture as it is today.<sup>27</sup> At the turn of the twentieth century, tobacco was commonly smoked in pipes or

---

[t]here are claims that environmental tobacco smoke, is a cause of various diseases. We believe, however, that the claim that ETS exposure has been shown to be a cause of chronic disease is not supported by the science that has developed over the past twenty years or so. In our view, it has not been established [sic] that ETS exposure genuinely increases the risk of non smokers developing lung cancer, heart disease or chronic obstructive pulmonary disease.

P.J. Carroll & Company Limited, at <http://www.pjcarroll.ie/views/passive.html> (last visited Nov. 23, 2002).

24. *More People Smoking Despite Known Health Risks* (Nov. 18, 1999), at <http://www.cnn.com/HEALTH/cancer/9911/18/more.than.cancer/>.

25. See discussion *infra* Part III. B.

26. See CIGARETTES, *supra* note 10, at vii-xiv.

27. See *id.*

cigars or used in its smokeless forms.<sup>28</sup> However, this changed when smokers realized that “the cigarette allowed tobacco . . . to be inhaled easily”<sup>29</sup> and “provided the opportunity for a ‘quick smoke’ anytime and anywhere, as opposed, for example, to the ritual after-dinner smoking of a cigar or a pipe.”<sup>30</sup> As a result of these “two notable ‘advantages’ over other tobacco products”<sup>31</sup> the cigarette increased in popularity. During the first half of the century, cigarette consumption increased rapidly.<sup>32</sup> However, the publication of the 1964 Surgeon General’s Report,<sup>33</sup> the first report of its kind regarding smoking and its effect on health,<sup>34</sup> marked the beginning of the decline of cigarette consumption in the United States.<sup>35</sup> This report concluded that cigarette smoking is a health hazard because it is a leading cause of lung cancer, laryngeal cancer and chronic bronchitis.<sup>36</sup> Since this report, there have been thousands of articles published concluding that smoking is harmful.<sup>37</sup>

The decline in cigarette consumption has been accompanied by a decline in the social acceptability of smoking.<sup>38</sup> In the 1940s and 1950s, smoking was stylish. Today, it is considered an annoyance.<sup>39</sup> The debate over the right to a smoke-free environment between smokers and nonsmokers is a hot topic.<sup>40</sup> On one side, smokers assert that they have a constitutional right to smoke.<sup>41</sup> On the other side, nonsmokers assert that they have an equal right to freedom from sickness or irritation caused by

---

28. *Id.* at vii.

29. *Id.*

30. *Id.*

31. *Id.*

32. *See id.*

33. *See* 1964 SURGEON GENERAL’S REPORT, *supra* note 11.

34. *Id.*

35. *See* CIGARETTES, *supra* note 10, at vii-xiv.

36. *See* 1989 SURGEON GENERAL’S REPORT, *supra* note 12 (summarizing the findings of the 1964 Surgeon General’s Report).

37. CIGARETTES, *supra* note 10, at xiii.

38. *See* 1986 SURGEON GENERAL REPORT’S, *supra* note 14, at xi.

39. *See* 1989 SURGEON GENERAL REPORT’S, *supra* note 12, at iv.

40. ROBERT D. TOLLISON, CLEARING THE AIR: PERSPECTIVES ON ENVIRONMENTAL TOBACCO SMOKE 1 (1988).

41. Alan S. Kaufman, *Where There’s Smoke There’s Fire: The Search for Legal Paths to Tobacco-Free Air*, 3 COLUM. J. ENVTL. L. 62, 70 (1976) (arguing that even if a person has a constitutionally protected right to smoke, that right is not absolute; it is limited by a state’s police power to protect the public health, safety and welfare of its citizens).

tobacco smoke.<sup>42</sup> The United States Government is also involved in this debate. The government's concern with the health effects of smoking is illustrated by the numerous public service announcements regarding the harmful effects of tobacco smoke.<sup>43</sup> As scientific studies continue to reveal the detrimental effects smoking has on nonsmokers,<sup>44</sup> a growing body of legislation and regulation is emerging to restrict smoking in public places.<sup>45</sup>

The majority of states now have some form of legislation controlling or restricting smoking in various public settings.<sup>46</sup> Although some states limit smoking to only a few designated areas,<sup>47</sup> many states are increasingly developing and implementing comprehensive legislation that restricts smoking in many public settings, including the workplace.<sup>48</sup> Extending child abuse and neglect statutes to include consideration of parental smoking is consistent with the current social movement toward a smoke-free environment. This movement focuses on protecting citizens, who consciously choose not to smoke, from the dangerous acts of others. In the opinion of the proponents, consideration of parental smoking in neglect and abuse proceedings would protect innocent children from their parents' harmful behavior.

---

42. See, e.g., *Alexander v. California Unemployment Ins. Appeals Bd.*, 163 Cal. Rptr. 411, 413 (1980) (holding that a worker allergic to smoke has a right to terminate employment and collect unemployment insurance benefits where tobacco smoke was present because such work would be harmful to her health). See also *Shimp v. New Jersey Bell Tel. Co.*, 368 A.2d 408, 415 (N.J. 1976) ("the right of an individual to risk his or her health does not include the right to jeopardize the health of those who must remain around him or her in order to properly perform the duties of their jobs.").

43. For example, a new public service announcement entitled *The Promise* was recently released. *The Promise* is the second wave of the Secondhand Smoke Public Service Announcement asking parents to smoke outside to protect their children's health. *The Promise* PSA was produced in cooperation with the U.S. EPA, the American Medical Association and the Consumer Federation of America Foundation. In order to view *The Promise* go to <http://www.epa.gov/smokefree/psa.html> (last visited Jan. 21, 2002).

44. See discussion *infra* Part III.A.2.b.

45. William K. Grisham, Jr., *Passive Smoking: Are We Our Brother's Keeper?*, 13 AM. J. TRIAL ADVOC. 901, 909-11 n.48 (1989) (citing a comprehensive list of state smoking regulations).

46. *Id.* at 909.

47. See *id.*

48. See *id.*

## *B. Parental Rights and the Best Interests of the Child*

### *1. The Legal Rights of Parents*

The term "parent" means the lawful father or mother of a person.<sup>49</sup> At common law, the term "child" means a person who has not reached the age of fourteen, though the age now varies by state statute.<sup>50</sup> The phrase, "parent and child," is used to indicate the relationship existing between a parent and his or her legitimate offspring.<sup>51</sup> The legal rights of the parent are not absolute.<sup>52</sup> The state can determine when and in what manner the relationship between parent and child is severed.<sup>53</sup>

Parenthood involves duties as well as rights.<sup>54</sup> General duties of parenthood include the following minimum standards: "[to] express love and affection for the child; [to] express personal concern over the health, education and general welfare of the child; to supply necessary food, clothing and medical care; [and] to provide an adequate home and a duty to give social and religious guidance."<sup>55</sup> Compliance with these general duties is considered essential in fostering a positive parent-child relationship.

Along with the above mentioned duties, the United States Constitution recognizes that legal rights are embodied within the parent-child relationship. These legal rights include the following: physical ownership of a child; discipline of a child, which includes the right to instill a parent's moral and ethical standards in a child; control and management of a minor child's earnings; control and management of a minor child's property; support by an adult child; and preventing adoption without the parent's consent.<sup>56</sup>

Ordinarily, the legal rights and duties existing between parent and child continue until, and terminate when, the child attains the age of majority.<sup>57</sup> Termination of the relationship between parent and child, except where it occurs automatically by the child's attainment of the age of majority, must

---

49. BLACK'S LAW DICTIONARY 1137 (7th ed. 1999).

50. *Id.* at 232.

51. *People v. Fitzgerald*, 152 N.Y.S. 641, 643 (1915).

52. *See, e.g., Rhodes v. State*, 47 S.E.2d 293 (Ga. 1948).

53. *See, e.g., Wilson v. Anderson*, 59 S.E.2d 836 (N.C. 1950).

54. *See, e.g., Ex parte Travis*, 126 N.Y.S.2d 130 (1953).

55. *Conley v. Walden*, 533 P.2d 955, 959 (Mont. 1975).

56. *L.A.M. v. State*, 547 P.2d 827, 833 (Alaska 1976).

57. *See, e.g., Gaskins v. Beasley*, 114 S.E.2d 373 (Ga. 1960).



be instituted by an authorized judicial proceeding in compliance with applicable statutes.<sup>58</sup>

## *2. The State's Interest in the Parent-Child Relationship*

The state has both an interest in the welfare of children and the authority to protect them.<sup>59</sup> The primary control and custody of a child is with the state.<sup>60</sup> The interest of the state exceeds the parent's natural right and authority over the child's custody.<sup>61</sup>

The constitution protects the right of parents to direct their children's upbringing and family autonomy against state interference, but such right of a parent is not absolute, and where harm to physical or mental health of [a] child or to public safety, peace, order or welfare is demonstrated, legitimate state interests may override parents' qualified right to control upbringing of their children.<sup>62</sup>

As a result, the state is allowed to prescribe reasonable tests and standards to gauge whether parents, by neglect or unsociable conduct, should lose their custody rights.<sup>63</sup> If the circumstances warrant, the state may intervene in the parent-child relationship in order to terminate the parent's right to custody and place the child in a more suitable environment.<sup>64</sup> However, the state's interest in protecting children is also not an absolute; the state's interest must be balanced against a parent's countervailing interest in being able to raise a child in an environment free from governmental interference.<sup>65</sup>

## *3. The Best Interests of the Child*

The interests of the parents, the state and the child are involved in child custody disputes. Of these three, the welfare and best interests of the child are the controlling elements in the determination of all custody

---

58. See, e.g., *Leach v. Leach*, 296 P.2d 1078 (Kan. 1956).

59. See, e.g., *Davis v. Willis*, 124 So. 129 (La. 1929).

60. See, e.g., *Tillman v. Walters*, 108 So. 62 (Ala. 1925).

61. See, e.g., *Leonhard v. Mitchell*, 473 F.2d 709 (2nd Cir. 1973).

62. *Bykofsky v. Borough of Middletown*, 401 F.Supp. 1242, 1262 (M.D. Pa. 1975).

63. See, e.g., *Brooks v. De Witt*, 178 S.W.2d 718 (Tex. App. 1944).

64. See, e.g., *Ekendahl v. Svolos*, 58 N.E.2d 585 (Ill. 1944).

65. See, e.g., *Alsager v. District Court of Polk County, Iowa (Juvenile Division)*, 406 F.Supp. 10 (S.D. Iowa 1975).

disputes.<sup>66</sup> The welfare and best interests include the child's temporal, mental and moral welfare, and the child's physical, intellectual, moral and spiritual well-being.<sup>67</sup> Nevertheless, there is no definitive rule regarding the best interests of the child. Each case must be determined on its own peculiar facts with respect to the happiness, training, development and morals of the child.<sup>68</sup>

The legal right of a parent to retain custody of a minor child is subordinate to the best interests of the child.<sup>69</sup> Parental rights will not be enforced if it is disadvantageous to the child.<sup>70</sup> Thus, in the absence of a statute to the contrary, the welfare of the child may require that custody be denied to the parent and awarded to other persons,<sup>71</sup> such as relatives<sup>72</sup> or even strangers.<sup>73</sup> However, the legal rights of the parents are of great importance, and such rights should not be lightly or arbitrarily disregarded.<sup>74</sup>

#### *4. Factors in Awarding Custody*

When a court addresses the issue of child custody, a court should consider the character, competency and conduct of the parties, particularly that of the parents.<sup>75</sup> Proper regard for the welfare of the child requires that parents refrain from conduct which reflects poorly on them and produces harmful effects upon the child.<sup>76</sup> The general rule states that custody will be refused to an individual who is "unfit."<sup>77</sup>

As applied to [the] relation of parents to their child, the word "unfit," usually, although not necessarily, imports something of moral delinquency; parents who treat a child with cruelty or inhumanity, or keep a child in vicious or disreputable

---

66. See *Sklaroff v. Skeadas*, 122 A.2d 444, 446 (R.I. 1956) and *Massey v. Flinn*, 128 S.W.2d 1008 (Ark. 1939).

67. See, e.g., *Morris v. Jackson*, 212 P.2d 78 (Wyo. 1949). See also *In re Adoption of Biery*, 522 P.2d 1377 (Mont. 1974).

68. See, e.g., *Piotrowski v. State on Application of Kowalek*, 18 A.2d 199 (Md. 1941).

69. See, e.g., *Beach v. LeRoy*, 89 N.E.2d 912 (Ind. 1950).

70. See, e.g., *Morris v. Jackson*, 212 P.2d 78 (Wyo. 1949).

71. See, e.g., *Chandler v. Whatley*, 189 So. 751 (Ala. 1939).

72. See, e.g., *Smith v. Jones*, 153 So. 2d 226 (Ala. 1963).

73. See, e.g., *Dietrich v. Anderson*, 43 A.2d 186 (Md. 1945).

74. See, e.g., *Culpepper v. Osteen*, 13 So. 2d 911 (Fla. 1943).

75. See, e.g., *Chandler v. Whatley*, 189 So. 751 (Ala. 1939).

76. See, e.g., *Berigan v. Berigan*, 176 N.W.2d. 1 (Neb. 1970).

77. See, e.g., *Lewis v. Lewis*, 60 So. 2d 145 (Ala. 1952).

surroundings are unfit, or who abandon a child or neglect or refuse, when able to do so, to provide proper or necessary support and education required by law, or other care necessary for a child's well being are unfit.<sup>78</sup>

An unfit parent includes: "one who is a drunkard, an incompetent, a notoriously immoral person; one who is cruel or unkind towards his child;" and one whose conduct evinces indifference and irresponsibility.<sup>79</sup> Lack of fitness is a critical factor because it is the only instance where a natural parent will be deprived of custody by a court.<sup>80</sup> However, no inflexible rule has been set by the courts. Each custody case must be decided on its own particular facts.<sup>81</sup>

Additionally, in awarding custody of a minor child, courts consider the possible harm that may follow as a result of a child's removal from familiar surroundings.<sup>82</sup> This harm is apparent when a child displays fear at the suggestion of a change in residence and clearly expresses the desire to remain with people with whom he or she has been living.<sup>83</sup> Also, the harmful effects that result from "frequent changes in a child's surroundings and environment" must be considered in awarding custody.<sup>84</sup> These factors may be given controlling weight when the court is faced with inconclusive evidence.<sup>85</sup>

---

78. Application of Vallimont, 321 P.2d 190, 196 (Kan. 1958).

79. See, e.g., Application of Cleaves, 175 N.Y.S.2d 736 (1958).

80. See, e.g., Wilson v. Mitchell, 406 P.2d 4 (Alaska 1965).

81. See, e.g., Esco v. Davidson, 193 So. 308 (Ala. 1940).

82. See, e.g., Tucker v. Tucker, 180 S.W.2d 571 (Ark. 1944).

83. See *id.*

84. Page v. Page, 196 S.W.2d 580, 581 (Ark. 1946) (explaining that "[T]his one factor should never be permitted to control a decision in a case of this kind where the evidence clearly shows that a change in custody of the children is required, but it is always to be considered and may be entitled to controlling weight, where from the evidence there is doubt as to what order should be made.").

85. See *id.*

## II. ANALYSIS

### *A. Extending Child Abuse and Neglect Statutes to Include Consideration of Parental Smoking in Child Abuse and Neglect Proceedings*

#### *1. Legislative Views*

The majority of state child neglect and abuse statutes refer simply to drug use as proof of neglect or abuse.<sup>86</sup> The Surgeon General has unequivocally reported that cigarette smoking is a form of drug addiction.<sup>87</sup> In addition, the Surgeon General has established that the nicotine contained in tobacco is the specific drug that causes the addiction.<sup>88</sup> Nicotine has been found to be as addictive as cocaine and heroin.<sup>89</sup> One study shows that nicotine is such an addictive substance that a majority of patients in drug treatment facilities, when asked what drug they craved most, listed tobacco first, before drugs like cocaine, heroin and alcohol.<sup>90</sup> Because nicotine is an addictive drug, child neglect and abuse statutes should incorporate cigarette smoking into their language, and given that nicotine is the addictive drug contained in cigarettes,<sup>91</sup> these statutes should be interpreted *ipso facto* to include cigarette use as proof of neglect or abuse.

In contrast, a few state statutes broadly define neglect and abuse. Unlike the majority of state statutes, these statutes do not enumerate specific instances that constitute *prima facie* evidence of neglect or abuse.<sup>92</sup> Despite the lack of specific instances that constitute *prima facie* evidence,

---

86. See, e.g., *In re Tyesha*, 556 N.Y.S.2d 280, 282 (1990) (reciting section 1012(f)(i)(B) of the Family Court Act which defines a neglected child as one whose parent or other legal guardian misuses "a drug or drugs").

87. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING, NICOTINE ADDICTION, A REPORT OF THE SURGEON GENERAL 149 (1988) [hereinafter 1988 SURGEON GENERAL'S REPORT].

88. See *id.*

89. See *id.*

90. See DAVID KROGH, SMOKING: THE ARTIFICIAL PASSION 11, 93-4 (1991).

91. See 1988 SURGEON GENERAL'S REPORT, *supra* note 87, at 14.

92. See, e.g., COLO. REV. STAT. § 18-6-401 (1997) (defining child abuse as injury to a child's life or health or placement of a child in a situation that poses a threat of injury to the child's life or health); MD. CODE ANN., FAM. LAW § 5-701 (1991) (defining abuse as any physical or mental injury to a child and defining neglect as failure to give proper care and attention to a child); and TEX. FAM. CODE ANN. § 261.001 (West 1996) (defining abuse as the actual or threat of mental, emotional or physical injury to a child).

several courts have held, under these broad statutes, that a mother's drug or alcohol abuse constitutes "neglect" or "abuse."<sup>93</sup> Courts justify these controversial decisions by using the "imminent danger of impairment" theory which focuses on the dangerous effects that a mother's drug and alcohol abuse can have on both an *in utero* and infant child.<sup>94</sup> Accordingly, if a parent's cigarette smoking can be shown to pose an "imminent danger" to an infant child, it follows that a parent's cigarette use would qualify as proof of "neglect" or "abuse" under these broad statutes.

## 2. Judicial Views

In 1975, Michael Wald stated that "most neglect statutes define neglect in terms of parental behavior."<sup>95</sup> This is no longer the case in the majority of states. Most states require proof of actual harm to the child as a prerequisite for intervention by the state in child abuse or neglect proceedings.<sup>96</sup>

These state statutes, which explicitly require a showing of harm before a child can be declared neglected, are subject to multiple interpretations by the courts, resulting in the focus of the proceedings being the parental misconduct, not the harm to the child.<sup>97</sup> Even if a showing of harm is a prerequisite for state intervention, the alleged harm or threat of harm, once identified, is often forgotten when courts make parental misconduct the crucial subject of inquiry.<sup>98</sup> Courts often assume that parental alcohol or drug misuse inevitably results in harm to the child.<sup>99</sup> As a result, a summary finding of parental misconduct in judicial proceedings frequently

---

93. See San Diego County Dep't of Soc. Servs. v. Kelly D., 263 Cal. Rptr. 869 (1990) (interpreting child abuse and neglect statutes to cover amphetamine and opiate use during pregnancy); In re Baby X, 293 N.W.2d 736 (Mich. 1980) (holding that prenatal conduct can constitute neglect sufficient for the court's assertion of jurisdiction and that a newborn suffering from narcotics withdrawal symptoms due to prenatal maternal drug addiction is a neglected child within jurisdiction of probate court).

94. See 1988 SURGEON GENERAL'S REPORT, *supra* note 87, at 14.

95. Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1007 (1975).

96. Robin-Vergeer, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 759-60 (1990).

97. *Id.*

98. *Id.*

99. *Id.*

replaces a complete examination of whether harm to the child has occurred or is likely to occur.<sup>100</sup>

Courts often focus on parental misconduct for one simple reason: it is easier.<sup>101</sup> Judges are not trained in psychological theory, nor are they chosen especially for their insights into the behavior of people.<sup>102</sup> Reaching conclusions based on a person's behavior is easier than drawing conclusions about the effects of the behavioral interactions between parents and children.<sup>103</sup> The inherent difficulty in deciphering the short and long term effects of parental behavior on children suggests that courts, when possible, should refrain from focusing on parental misbehavior. Instead, courts should focus more on protecting children from certain basic harms.<sup>104</sup>

### 3. Recent Judicial Developments

American family law jurisprudence has undergone an enlightened change within the past fifteen years. This change has embraced the idea that a court should focus on a child's welfare rather than on the particular parental misconduct when conducting a neglect proceeding.<sup>105</sup> Increasingly, an evidentiary showing of harm to the child has become a prerequisite for state intervention.<sup>106</sup> In other words, many state neglect statutes preclude intervention except in cases of actual or imminent harm to the child.<sup>107</sup> Thus, intervention by state agencies cannot be predicated upon parental misconduct, however egregious or bizarre, unless actual or imminent harm to the child has been proven.<sup>108</sup>

The most enlightened neglect statutes predicate state intervention on a showing of serious harm to the child and do not refer to parental misconduct. These statutes include alcohol and drug misuse as factors for courts to consider in neglect proceedings. Washington has a statute which precludes reference to parental misconduct in abuse or neglect proceedings. The statute states in pertinent part:

---

100. *Id.*

101. *See, e.g.,* In the Matter of Smith, 492 N.Y.S.2d 331 (1985).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

'abuse or neglect' shall mean the injury, sexual abuse, sexual exploitation, negligent treatment, or maltreatment of a child, . . . by any person under circumstances which indicate that the child's . . . health, welfare, and safety is harmed. An abused child is a child who has been subjected to child abuse or neglect as defined herein.<sup>109</sup>

This type of statute could be used as a model for jurisdictions that wish to focus the determination of neglect or abuse on the actual harm suffered by the child.

### III. PARENTAL SMOKING IS CHILD ABUSE

In 1997, James Garbarino, an internationally recognized expert on child protection and the director of Cornell University's Family Life Development Center stressed, "[l]et's call it what it is: Parental smoking is child abuse."<sup>110</sup> According to Garbarino, before any parental act qualifies as child abuse or neglect, falling within the jurisdiction of the state, it must meet three conditions.

First, there must be a basis in scientific knowledge or professional expertise that a particular practice is harmful or dangerous to children. Second, there must be a public debate stimulated by child advocates to use the new knowledge as a basis for challenging what has been regarded as normal and acceptable child rearing. Third, community values must adapt by accepting a new standard of care for children.<sup>111</sup>

In the following subsections, this comment will demonstrate that parental smoking satisfies the three conditions necessary to qualify as child abuse or neglect.

#### *A. Scientific Knowledge: The Harmful Effects ETS has on Children*

##### *1. The Components of ETS*

Medical and scientific research has concluded that tobacco smoke is a complex chemical cocktail made up of thousands of tiny particles and

---

109. WASH. REV. CODE ANN. § 26.44.020(12) (1990).

110. *Cornell Child Abuse Expert Says It's Time to Recognize Smoking as Child Abuse*, Cornell Science News (Sept. 26, 1997), at <http://www.news.cornell.edu/releases/Sept97/smoking.abuse.ssl.html>.

111. *Id.*

gases.<sup>112</sup> The particles include tar, nicotine, benzene and benzpyrene.<sup>113</sup> The gases include carbon monoxide, ammonia, hydrogen, cyanide and formaldehyde.<sup>114</sup> A smoker is not the only person who inhales the over 3,800 chemical compounds found in cigarette smoke.<sup>115</sup> Smokers actively inhale cigarette smoke only ten percent of the actual time they are smoking.<sup>116</sup> The remaining ninety percent of the time the cigarette idly burns. The ETS from an idling cigarette pollutes the air surrounding the smoker.<sup>117</sup> "Nonsmokers who breathe ETS are called 'passive' or 'involuntary' smokers."<sup>118</sup> Therefore, nonsmokers become smokers by association.

According to scientific studies, "there are three types of tobacco smoke: mainstream smoke, sidestream smoke and environmental tobacco smoke."<sup>119</sup> ETS consists of exhaled mainstream smoke, which escapes from the burning tobacco during the smoker's puff-drawing and gases which diffuse through the cigarette paper while the cigarette burns (i.e., sidestream smoke).<sup>120</sup> Mainstream smoke is produced when a smoker is inhaling the cigarette, thereby drawing oxygen through the lit end and increasing the burning temperature.<sup>121</sup> Mainstream smoke produces less air pollution because of the increased burning temperature.<sup>122</sup> In contrast, a cigarette that is not actively inhaled burns at a low temperature.<sup>123</sup> Because this idling sidestream smoke results from combustion at a lower temperature, it contains significantly higher concentrations of many toxic and carcinogenic compounds found in mainstream smoke.<sup>124</sup> The major source of ETS is sidestream smoke.<sup>125</sup> Thus, because the majority of

---

112. *Environmental Tobacco Smoke: Proceedings of the International Symposium at McGill University 1989* at 3-50 (Donald J. Ecobichon & Joseph M. Wu eds., 1990) [hereinafter *Environmental Tobacco Smoke*].

113. *Id.*

114. *Id.*

115. *Id.*

116. Stanton A. Glantz & Richard A. Daynard, *Safeguarding the Workplace: Health Hazards of Secondhand Smoke*, 27 TRIAL 37, 38 (June 1991).

117. *See id.*

118. *Id.*

119. CIGARETTES, *supra* note 10, at 70-75.

120. *Id.*

121. *Id.*

122. *Id.*

123. *See id.*

124. *See Environmental Tobacco Smoke, supra* note 112, at 53-68.

125. *See id.*



smoke that a passive smoker inhales does not have the benefit of a high burning temperature or filtration by the cigarette itself, it is more highly contaminated with tobacco particles and gas than the mainstream smoke that the smoker inhales.<sup>126</sup>

Laboratory tests of cigarette smoke confirm that sidestream smoke has higher concentrations of the 4,000 poisons contained within tobacco smoke.<sup>127</sup> There is twice as much tar and nicotine in sidestream smoke than in the smoke inhaled directly from the cigarette.<sup>128</sup> There is also three times as much carbon monoxide, which robs the blood of oxygen; thirty times as much zinc and nickel; up to fifty times more formaldehyde; twenty to one hundred times as much cancer-causing N-nitrosamine; and up to one hundred and seventy times as much ammonia within sidestream smoke.<sup>129</sup> These chemicals affect everyone who inhales them. These effects, harmful to adults, are more profound on children, whose bodily tissues are still developing.<sup>130</sup>

## 2. *ETS' Effects on a Child's Health*

### a. *Acute, Noxious Effects*

Several studies "show excess acute respiratory illness in the children of parents who smoke, particularly in children under two years of age."<sup>131</sup> Additionally, "the increased risk of hospitalization for severe bronchitis or pneumonia associated with parental smoking ranges from twenty to forty percent during the first year of life."<sup>132</sup> These findings illustrate the urgent need to protect innocent children from the harmful effects of cigarette smoke.

It is hypothesized by several scientists that "time-activity patterns of infants, which generally place them in proximity to their mothers, may lead to particularly high exposures to environmental tobacco smoke if the mother smokes."<sup>133</sup> These studies lend support to the view that young children are in greater need of protection than adults.<sup>134</sup>

---

126. *See id.*

127. Tod W. Burke, *Up in Smoke: Secondhand Smoke Health Risks Have Staff and Inmates Fuming*, 52 CORRECTIONS TODAY 152, 154 (July 1990).

128. *Id.*

129. *Id.*

130. *Environmental Tobacco Smoke*, *supra* note 112, at 205-26.

131. 1986 SURGEON GENERAL'S REPORT, *supra* note 14, at 44.

132. *Id.*

133. *Id.*

134. *Id.*

*b. Respiratory Rate, Lung Function and Other Health  
Considerations in Children*

In infancy, exposure to ETS may increase a child's susceptibility to viral respiratory infections that follow into later childhood and adult life.<sup>135</sup> Respiratory problems, such as wheezing, coughing and sputum production, are higher in children of smoking parents than in children of nonsmoking parents.<sup>136</sup> A 1984 study of more than 10,000 children between the ages six and nine years-old found that the prevalence of a persistent cough and wheeze was higher in children whose parents smoked than in children whose parents did not smoke.<sup>137</sup>

Initially, health experts thought that exposure to ETS affected only young children. Studies now show that the health risks of living with parents who smoke and exposure to ETS as a child may continue into the child's adolescent years.<sup>138</sup> Researchers associate decreased pulmonary function and lung growth in children with parental smoking.<sup>139</sup> It has been found that children with one or more smoking parents have a slower lung growth rate.<sup>140</sup> Decreased lung growth rate may lead to an increase in the lung's susceptibility to chronic obstructive lung disease.<sup>141</sup> Research suggests that there may be a link between exposure to ETS during childhood and the risk of lung cancer later in life.<sup>142</sup>

A number of studies "show an excess of chronic middle ear effusions and diseases in children exposed to parental smoking."<sup>143</sup> However, this problem deserves further study because of "potential confounding factors for middle ear effusions."<sup>144</sup> Nevertheless, children of smoking families may be seriously affected by ETS exposure in their homes. In response to this fear, nonsmoking parents have turned to the courts for assistance.

---

135. *Id.*

136. *Id.* at 48.

137. *Id.*

138. *Id.* at 44.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 58-59.

144. *Id.* at 59.

*B. Changing the Norm: Cases in Which Courts Consider Parental Smoking*

Smoking behavior and the health effects of ETS are now factors in judicial examinations of parent-child relationships.<sup>145</sup> In the past fifteen years, there has been significant publicity regarding the impact of a parent's smoking habits on child custody determinations.<sup>146</sup> In *Lizzio v. Lizzio*,<sup>147</sup> for example, the court took judicial notice of the hazards of cigarette smoke, "both actively and passively,"<sup>148</sup> and changed custody of a couple's two small children from the smoking mother to the nonsmoking father.<sup>149</sup> In *Roofeh v. Roofeh*,<sup>150</sup> the Supreme Court of New York, Nassau County, exercising its inherent power to issue orders protecting the health and safety of a child, issued a temporary order restricting a mother's smoking habit in an attempt to safeguard her children's health and safety.<sup>151</sup> In *Roofeh*, the mother commenced a divorce action and the father requested the court to restrict the mother's smoking habit in order to safeguard the health and safety of their children.<sup>152</sup> Moreover, the mother did not dispute the detrimental effects of her smoking on both herself and those who passively inhaled her cigarette smoke.<sup>153</sup> In light of the detrimental effects and the fact that the mother admitted ETS' harmful health effects, the court ordered her to refrain from smoking cigarettes in close proximity to the children.<sup>154</sup> The court also confined her smoking to a specific room in the house, provided that none of the children were present in the room while she smoked.<sup>155</sup>

In *Pizzitola v. Pizzitola*,<sup>156</sup> the Texas Court of Appeals granted a nonsmoking father custody of his daughter despite the fact that the

---

145. See, e.g., *Badeaux v. Badeaux*, 541 So. 2d 301, 302 (La. 1989); *Pizzitola v. Pizzitola*, 748 S.W.2d 568, 569 (Tex. 1988); and *Roofeh v. Roofeh*, 525 N.Y.S.2d 765, 766 (N.Y. Sup. Ct. 1988).

146. See Harriet Dinegar Milks, Annotation, *Smoking as Factor in Child Custody and Visitation Cases*, 36 A.L.R. 5th 377 (2002).

147. 618 N.Y.S.2d 934 (1994).

148. *Id.* at 937.

149. *Id.*

150. *Roofeh*, 525 N.Y.S.2d at 765.

151. *Id.* at 769.

152. *Id.* at 766.

153. *Id.* at 769.

154. *Id.*

155. *Id.*

156. 748 S.W.2d 568 (Tex. 1988).

mother was the child's primary caretaker during the marriage.<sup>157</sup> The father testified that he helped the mother raise the child and that the mother smoked in the child's presence.<sup>158</sup> In this case, the father was especially concerned about the mother's smoking habit due to the child's extreme allergy to cigarette smoke.<sup>159</sup> In deciding the issue, the jury considered each party's parental ability, their plans for the child, their respective home's stability and their acts or omissions.<sup>160</sup> After weighing all the facts, the jury determined that living with the father would be in the child's best interest.<sup>161</sup>

In 1989, the Louisiana Appeals Court considered a parent's smoking habits while making a custody and visitation determination.<sup>162</sup> In *Badeaux v. Badeaux*,<sup>163</sup> the nonsmoking mother had physical custody of the child and the smoking father had visitation rights.<sup>164</sup> The one-year-old child was diagnosed with asthma and was subject to repeated upper respiratory infections for which he received antibiotics.<sup>165</sup> The mother successfully petitioned the court for a reduction of the father's visitation rights due to his smoking habit.<sup>166</sup> The father, his mother and his step-father who lived with the father were all cigarette smokers. At the hearing, the father admitted knowing that exposure to cigarette smoke was bad for his child.<sup>167</sup> Upon its determination that it was in the child's best interest to spend more time with the mother, the trial court cited cigarette smoking and its effects on the child's health as a reason for limiting visitation.<sup>168</sup>

The issue of parental smoking in custody cases has been raised in several states.<sup>169</sup> In each case, the state court has held that it is appropriate to consider parental smoking in the presence of a child when determining whether a parent should be awarded custody.<sup>170</sup> Most custody cases are resolved with the court's entry of an order prohibiting the parent from

---

157. *Id.* at 569-70.

158. *Id.* at 569.

159. *Id.*

160. *Id.* at 570.

161. *Id.*

162. *Badeaux*, 541 So. 2d at 302-3.

163. *Id.* at 301.

164. *Id.* at 302.

165. *Id.*

166. *Id.* at 301-2.

167. *Id.*

168. *Id.* at 302-3.

169. See Milks, *supra* note 146, §§ 3-4.

170. *Id.*

smoking in close proximity to the child.<sup>171</sup> Also, some state courts have directed a modification of custody from one parent to the other where the child's health was gravely affected by one of the parents' smoking. For example, in *Skidmore-Shafer v. Shafer*,<sup>172</sup> evidence showed that the mother was a heavy to moderate smoker and the child suffered from asthma and upper respiratory infections.<sup>173</sup> The court stated that it

cannot comprehend [that] a parent, knowing their child suffers from asthma and severe upper respiratory infection problems . . . and being warned of the danger of cigarette smoking as it affects the child's asthma as well as the other well publicized . . . effects of secondhand cigarette smoke, would continue to [smoke], thereby directly contributing to the misery and suffering that this child has had to endure.<sup>174</sup>

The court further stated that "to do this to a child is no less child abuse than if you had deprived him of food or medical treatment."<sup>175</sup> The court found that the change of custody would materially promote the child's best interest and welfare and that the good brought about by the change would offset any disruptive effect caused by uprooting the child.<sup>176</sup>

### *C. Community Values: Accepting a New Standard of Care for Children*

#### *1. Legal Developments*

In an encouraging development, a judge in Ohio, learning that a child in a case before him was being subjected to tobacco smoke, acted on his own initiative and ordered a ban on smoking in the house.<sup>177</sup> In the case of *In re Julie Anne*,<sup>178</sup> the court held that based upon judicially noticed authoritative scientific evidence that secondhand smoke is a real and substantial danger to the health of children because it causes and aggravates serious diseases in children, the parents were restrained from allowing any person, including themselves, from smoking tobacco in the presence of the child.<sup>179</sup> The court's opinion states that "a family court that fails to issue court orders restraining persons from smoking in the presence of children within its care is failing the children whom the law

---

171. See *id.* § 3.

172. *Skidmore-Shafer v. Shafer*, 770 So. 2d 1097 (Ala. Civ. App. 1999).

173. *Id.* at 1099.

174. *Id.* at 1099-1100.

175. *Id.* at 1100.

176. *Id.*

177. *In re Julie Anne*, 780 N.E.2d 635 (Ohio Com.Pl. 2002).

178. *Id.*

179. *Id.* at 659.

has entrusted to its care.”<sup>180</sup> This opinion suggests that all family court judges have a duty to act on their own initiative to protect children before them if they are being subjected to tobacco smoke.

### *2. Society's Response: Movement Towards a Smoke-Free Environment*

The movement towards a smoke-free environment is led by several public interest groups. Action on Smoking and Health (ASH) is a non-profit tax-exempt legal action antismoking organization based in the United States that has been solely devoted to the many problems of smoking for over 35 years.<sup>181</sup> Its principal activity is to serve as the legal action arm of the nonsmoking community, bringing or joining in legal actions concerning smoking, and insuring that the voice of the nonsmoker is heard.<sup>182</sup> It also serves as an advocate of the nonsmokers' rights movement.<sup>183</sup>

Also, the Foundation for a Smokefree America has had tremendous success as a volunteer based organization. This organization was founded in 1989 by Patrick Reynolds, a grandson of the founder of the R.J. Reynolds Tobacco Company.<sup>184</sup> Patrick quit smoking and became an advocate for a smoke-free environment after the death of his father and oldest brother from cigarette-induced emphysema and cancer.<sup>185</sup>

### *3. Technological Developments: Available Testing for Exposure to Environmental Tobacco Smoke*

Enforcement is a major concern regarding a court's entry of an order prohibiting a parent from smoking in close proximity to his or her child. How can a court be sure that a parent is following a prohibition order? A child's involuntary exposure to tobacco smoke can be measured in several ways: air sampling, use of biomarkers and application of survey instruments.<sup>186</sup> Air sampling involves measuring concentrations of such markers as respirable suspended particulates or nicotine in the air.<sup>187</sup>

---

180. *Id.*

181. Action on Smoking & Health, *Ash, the Organization*, at <http://ash.org/ashintro.html> (last visited Feb. 24, 2003).

182. *Id.*

183. *Id.*

184. The Foundation for a Smoke-Free America, *Who We Are*, at <http://www.anti-smoking.org/who.htm> (last visited Feb. 24, 2003).

185. *Id.*

186. See *Environmental Tobacco Smoke*, *supra* note 112, at 53-68.

187. *Id.*

Biomarkers involve measuring concentrations of smoke components in biological materials, most commonly cotinine in saliva or urine.<sup>188</sup> Both nicotine measurement and air sampling are limited to describing current exposure.<sup>189</sup>

### CONCLUSION

As demonstrated above, parental smoking is child abuse. First, there is a considerable amount of scientific evidence supporting the conclusion that ETS is harmful to children. Second, courts are now recognizing that parental smoking and the adverse effects of ETS are important issues in making child custody and visitation determinations. Finally, our community has embraced the movement toward a smoke-free environment.

In 1986, C. Everett Koop, M.D., the Surgeon General, "strongly urge[d] parents to refrain from smoking in the presence of children as a means of protecting . . . their children's current health status."<sup>190</sup> Achieving a smoke-free environment is an increasingly important public health policy goal in view of the mounting scientific evidence linking tobacco use with disease in tobacco users and others exposed to tobacco by-products. In order to protect the best interests of the child, our legislature and judiciary must consider evidence of parental smoking in child neglect and abuse proceedings.

---

188. *Id.*

189. *Id.*

190. 1986 SURGEON GENERAL'S REPORT, *supra* note 14, at xi.